

83/69-6

No. _____
Court of Appeals No. 61462-2-I

FILED
JUN 13 2009
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS DIV. II
STATE OF WASHINGTON
2009 MAY 13 PM 4:41

STATE OF WASHINGTON,

Respondent,

v.

MARILEA R. MITCHELL,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Thomas J. Wynne

PETITION FOR REVIEW

SARAH M. HROBSKY
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

| | | |
|----|---|----|
| A. | <u>IDENTITY OF PETITIONER</u> | 1 |
| B. | <u>COURT OF APPEALS DECISION</u> | 1 |
| C. | <u>ISSUES PRESENTED FOR REVIEW</u> | 1 |
| D. | <u>STATEMENT OF THE CASE</u> | 3 |
| E. | <u>ARGUMENT</u> | 6 |
| 1. | THE COURT OF APPEALS MISCONSTRUED THE CRIMINAL MISTREATMENT STATUTE IN RULING THAT A FOUR-YEAR OLD CHILD COULD BE A "DEPENDENT PERSON" AND THAT SUFFICIENT EVIDENCE ESTABLISHED S.A. WAS A DISABLED DEPENDENT PERSON | 6 |
| 2. | THE COURT OF APPEALS ERRED IN RULING THAT S.A. WAS "PARTICULARLY VULNERABLE" | 14 |
| F. | <u>CONCLUSION</u> | 18 |

TABLE OF AUTHORITIES

United States Constitution

| | |
|------------------|----|
| Amend. XIV | 12 |
|------------------|----|

Washington Constitution

| | |
|----------------------|----|
| Art. I, sec. 3 | 12 |
|----------------------|----|

United States Supreme Court Decision

| | |
|--|----|
| <u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) | 12 |
|--|----|

Washington Supreme Court Decisions

| | |
|--|----|
| <u>City of Bellevue v. Lorang</u> , 140 Wn.2d 19, 992 P.2d 496 (2000) | 8 |
| <u>Pub. Util. Dist. No. 1 of Pend Oreille County v. State Dep't of Ecology</u> , 146 Wn.2d 778, 51 P.3d 744 (2002) | 11 |
| <u>State v. Bolar</u> , 129 Wn.2d 361, 917 P.2d 125 (1996) | 9 |
| <u>State v. Cooper</u> , 156 Wn.2d 475, 128 P.3d 1234 (2006) | 8 |
| <u>State v. Delgado</u> , 148 Wn.2d 723, 63 P.3d 792 (2003) | 11 |
| <u>State v. Hundley</u> , 126 Wn.2d 418, 895 P.2d 403 (1995) | 12 |
| <u>State v. Jacobs</u> , 154 Wn.2d 596, 115 P.3d 281 (2005) | 8 |
| <u>State v. Law</u> , 154 Wn.2d 85, 110 P.3d 717 (2005) | 14 |
| <u>State v. Roberts</u> , 117 Wn.2d 576, 817 P.2d 855 (1991) | 11 |
| <u>State v. Roggenkamp</u> , 153 Wn.2d 614, 106 P.3d 196 (2005) | 8 |
| <u>State v. Sigman</u> , 118 Wn.2d 442, 826 P.2d 144 (1992) | 9 |
| <u>State v. Suleiman</u> , 158 Wn.2d 280, 143 P.3d 795 (2006) | 14 |

| | |
|--|----|
| <u>State v. Swanson</u> , 115 Wn.2d 21, 804 P.2d 1 (1990) | 11 |
| <u>State Dep't of Ecology v. Campbell & Gwinn, L.L.C.</u> , 146 Wn.2d 1, 43 P.3d 4 (2002) | 8 |

Washington Court of Appeals Decisions

| | |
|---|----|
| <u>State v. Barnett</u> , 104 Wn. App. 191, 16 P.3d 74 (2001) | 16 |
| <u>State v. Hooper</u> , 100 Wn. App. 179, 997 P.2d 936 (2000) | 17 |
| <u>State v. Jackmon</u> , 55 Wn. App. 562, 778 P.2d 1079 (1989) | 17 |
| <u>State v. Serrano</u> , 95 Wn. App. 700, 977 P.2d 47 (1999) | 16 |

Statutes

| | |
|----------------------|-------------|
| RAP 13.4 | 1, 2, 3, 18 |
| RCW 9.94A.535 | 14 |
| RCW 9.94A.537 | 14 |
| RCW 9.94A.585 | 14 |
| RCW 9A.08.010 | 7 |
| RCW 9A.42.010 | 7 |
| RCW 9A.42.005 | 9-10 |
| RCW 9A.42.020 | 4, 6-7, 10 |
| RCW 18.51.010 | 7 |
| RCW 70.128.010 | 7 |
| RCW 74.34.020 | 7 |

Other Authority

| | |
|--|-------|
| Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (4 th ed. 1994) | 15-16 |
|--|-------|

A. IDENTITY OF PETITIONER

Marilea R. Mitchell, petitioner here and appellant below, requests this Court grant review of the decision designated in Part B of the petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, Ms. Mitchell requests this Court grant review of the published decision of the Court of Appeals, 61462-2-I (April 13, 2009). A copy of the decision is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. When interpreting a statute, courts presume the Legislature intended different meanings when it uses different terms in the same statute. The criminal mistreatment in the first degree statute penalizes persons who violates a duty of care to either a "child," defined as a person less than eighteen years of age, or a "dependent person," defined as a person who has a mental or physical disability or is of extreme advanced age. Does the Court of Appeals' ruling that the terms "child" and "dependent person" are not mutually exclusive conflict with rules of statutory construction as set forth in decisions by this Court and other decisions by the Court of Appeals, as well as involve an issue of

substantial public interest that should be determined by this Court, pursuant to RAP 13.4(b)(1), (2), and (4)?

2. The due process provisions of the federal and state constitutions require the State to prove beyond a reasonable doubt every essential element of the crime charged. An essential element of the crime of criminal mistreatment in the first degree, as charged in the instant case, was Ms. Mitchell “assumed the responsibility to provide to a dependent person the basic necessities of life.” A “dependent person” is defined as a person who has a mental or physical disability or is of extreme advanced age. Although no witnesses testified that S.A. had a mental or physical disability, and the trial court did not so find, the Court of Appeals ruled he was a dependent person because of severe malnutrition. Does the Court of Appeals’ ruling as to the sufficiency of the evidence conflict with decisions by the United States Supreme Court, decisions by this Court, and other decisions by the Court of Appeals, as well as raise a significant question of law under the federal and state constitutions, and involve an issue of substantial public interest that should be determined by this Court, pursuant to RAP 13.4(b)(1), (2), (3), and (4)?

3. An exceptional sentence above the standard range may be based on the victim's "particular vulnerability" only if the defendant knew or should have known of the victim's particular vulnerability and that vulnerability was a substantial factor in the commission of the offense. Here, in the absence of evidence S.A.'s food hoarding was a substantial factor in the commission of the offense, the Court of Appeals sua sponte characterized this behavior as an "eating disorder," and affirmed the exceptional sentence based on particular vulnerability. Does the Court of Appeals's analysis of "particularly vulnerable" conflict with decisions by this Court and other decisions by the Court of Appeals, as well as involve an issue of substantial public interest that should be determined by this Court, pursuant to RAP 13.4(b)(1), (2), and (4)?

D. STATEMENT OF THE CASE

For the first three years of his life, S.A. (DOB 10/22/2005) alternately lived with either his biological mother or a family friend. 12/17/07 RP 19; 12/18/07 RP 280; Ex. 59 at 25. S.A. was not fed on a regular basis while living with his mother due to her drug problems. 12/18/07 RP 280.

In December 2005, S.A. moved in with his biological father, Danny Abegg, and petitioner Marilea Mitchell. 12/17/07 RP 20;

12/18/07 RP 280. S.A. exhibited some behavioral problems, including food hoarding, which Mr. Abegg attributed to his lack of regular food while living with his biological mother. 12/18/07 RP 281; Ex. 59 at 20-23.

On March 7, 2007, police went to the home of Ms. Mitchell and Mr. Abegg to check on the welfare of S.A., and found him in bed, smelling of urine, emaciated, and unable to stand on his own. 12/18/07 RP 229, 234-36. S.A. was taken to a hospital and diagnosed with severe malnutrition, chronic muscle wasting, peripheral edema, abnormal blood chemistry, and an ulcerated foot. 12/17/07 RP 51, 137, 171-72.

Ms. Mitchell was charged by an amended information with one count of criminal mistreatment in the first degree, alleged to have been committed while she was "a person who has assumed the responsibility to provide to a dependent person the basic necessities of life," in violation of RCW 9A.42.020. CP 26-27. The information further alleged the offense was aggravated by (1) the victim's particular vulnerability, (2) deliberate cruelty, (3) an on-going pattern of abuse against a member of the household, (4) deliberate cruelty against a household member, and (5) egregious lack of remorse. CP 26.

The case proceeded to a bench trial, at the conclusion of which the court found Ms. Mitchell guilty of criminal mistreatment in the first degree, as charged in the information. CP 23-24, 52; 12/17/07 RP 4-5; 12/19/07 RP 417-19. Ms. Mitchell faced a standard range sentence of 31-41 months. CP 8. However, the court found aggravating factors (1) and (3) beyond a reasonable doubt and imposed an exceptional sentence above the standard range of ninety-six months. CP 23-24, 6-18; 12/19/07 RP 419-21, 3/14/08 RP 21-24.

Ms. Mitchell appealed and argued S.A. fell within the statutory definition of a “child,” rather than a “dependent person,” and, therefore, there was insufficient evidence to establish Ms. Mitchell assumed the responsibility to provide a dependent person the basic necessities of life, an essential element of the crime charged. Br. of App. at 7-12. She also argued there was insufficient evidence to support the exceptional sentence based on particular vulnerability in the absence of evidence to establish S.A.’s food hoarding was a substantial factor in the offense. Br. of App. at 13-19.¹

¹Ms. Mitchell also challenged the imposition of community custody that is not authorized for criminal mistreatment and the failure to give her credit for time

In a published opinion, the Court of Appeals disagreed with Ms. Mitchell and concluded the terms “child” and “dependent person” were not mutually exclusive, regardless of rules of statutory construction, because the criminal mistreatment statute does not “indicate an intention that a victim must fall into only one category.” Opinion at 6. In addition, the court found S.A. was particularly vulnerable because his preoccupation with and hoarding of food was “an eating disorder” that rendered him more vulnerable to starvation than other children. Opinion at 8-9.

E. ARGUMENT

1. THE COURT OF APPEALS MISCONSTRUED THE CRIMINAL MISTREATMENT STATUTE IN RULING THAT A FOUR-YEAR OLD CHILD COULD BE A “DEPENDENT PERSON” AND THAT SUFFICIENT EVIDENCE ESTABLISHED S.A. WAS A DISABLED DEPENDENT PERSON.

Ms. Mitchell was charged with criminal mistreatment in the first degree, committed by failing to provide food to S.A., a four year old boy, while she was “being at the time a person who has assumed the responsibility to provide to a dependent person the basic necessities of life,” CP 26. RCW 9A.42.020(1) sets forth four

served prior to sentencing. Br. of App. at 19-24. The State conceded error and the Court of Appeals remanded “for correction” of the sentence. Opinion at 9.

alternative means by which a person can commit criminal mistreatment in the first degree:

A parent of a child, the person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the first degree if he or she recklessly, as defined in RCW 9A.08.010, causes great bodily harm to a child or dependent person by withholding any of the basic necessities of life.

The terms “dependent person” and “child” are specifically defined for purposes of the criminal mistreatment statute. A “dependent person” is defined as:

"Dependent person" means a person who, because of physical or mental disability, or because of extreme advanced age, is dependent upon another person to provide the basic necessities of life. A resident of a nursing home, as defined in RCW 18.51.010, a resident of an adult family home, as defined in RCW 70.128.010, and a frail elder or vulnerable adult, as defined in RCW 74.34.020(13), is presumed to be a dependent person for purposes of this chapter.

RCW 9A.42.010(4). By contrast, a “child” is defined as:

“Child” means a person under eighteen years of age.

RCW 9A.42.010(3).

When interpreting a statute, courts first look to the “plain meaning” of the statutory language, as the clear expression of

legislative intent. State Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). "The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Courts are to read a statute as a whole and harmonize each provision so as to give meaning to each word and to avoid rendering any terms superfluous or redundant. State v. Cooper, 156 Wn.2d 475, 483, 128 P.3d 1234 (2006); City of Bellevue v. Lorang, 140 Wn.2d 19, 25, 992 P.2d 496 (2000).

"[T]he Legislature is deemed to intend different meanings when it uses different terms." State v. Roggenkamp, 153 Wn.2d 614, 625-26, 106 P.3d 196 (2005). Thus, the specific definition of "dependent person" and "child" signifies the Legislature's intent that the terms refer to two separate and distinct groups of persons.

Nonetheless, the Court of Appeals concluded "nothing in the statute" indicates the terms "dependent person" and "child" are mutually exclusive. Opinion at 6-7. This is incorrect. Where the term "or" is used in a statute, courts are to presume the Legislature intended the term be interpreted in its disjunctive sense, unless

there is a clear legislative intent to the contrary. State v. Bolar, 129 Wn.2d 361, 365-66, 917 P.2d 125 (1996); State v. Sigman, 118 Wn.2d 442, 448, 826 P.2d 144 (1992). The term “or” does not mean ‘and.’” Childers v. Childers, 89 Wn.2d 592, 596, 575 P.2d 201 (1978). Here, the phrase “child or dependent person,” appears twice in the criminal mistreatment statute (emphasis added). In the absence of a clear legislative intent to the contrary, the term “or” was intended to be interpreted in its disjunctive sense.

Further, the definition of “child” includes any person less than eighteen years of age, regardless of ability or disability. Because a disabled child is included in the definition of “child,” the court’s conclusion that a disabled child is also included in the definition of “dependent person” creates a redundancy, contrary to the plain language of the statute and to basic rules of statutory construction.

The Court of Appeals looked to RCW 9A.42.005, the Legislature’s statement of intent at the beginning of Chapter 9A.42, Criminal Mistreatment:

The legislature finds that there is a significant need to protect children and dependent persons, including frail elder and vulnerable adults, from abuse and neglect by their parents, by persons entrusted with their physical custody, or by persons

employed to provide them with the basic necessities of life. The legislature further finds that such abuse and neglect often takes the forms of either withholding from them the basic necessities of life, including food, water, shelter, clothing, and health care, or abandoning them, or both. Therefore, it is the intent of the legislature that criminal penalties be imposed on those guilty of such abuse or neglect.

Opinion at 5. However, this statement of intent does not refer to “a person who has assumed the responsibility to provide a dependent person the basic necessities of life,” as charged in the present case. Therefore, this statement of intent does not inform the issue sub judice.

The criminal mistreatment statute imposes a duty on four categories of persons: 1) “a parent of a child,” 2) “the person entrusted with the physical custody of a child or dependent person,” 3) “a person who has assumed the responsibility to provide to a dependent person the basic necessities of life,” and 4) “a person employed to provide to the child or dependent person the basic necessities of life.” RCW 9A.42.020(1). Of these four categories, the first category imposes a duty of care only to a child, the second and fourth categories impose a duty of care to both a child and a dependent person, while the third category, at issue here, imposes a duty of care only to a dependent person. The presence of a

requirement in one statute and its omission in another related statute indicates a difference of legislative intent. Pub. Util. Dist. No. 1 of Pend Oreille County v. State Dep't of Ecology, 146 Wn.2d 778, 797, 51 P.3d 744 (2002). “[W]here the Legislature uses certain statutory language in one instance, and difference language in another, there is a difference in legislative intent. State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d. 855 (1991), quoting In re Swanson, 115 Wn.2d 21, 27, 804 P.2d 1 (1990). Here, the carefully delineated different duties owed by different categories of caregivers to different separately defined groups of persons underscores the Legislature’s intent to draw a clear distinction between “child” and “dependent person.”

The Court of Appeals stated, “The statute simply uses the two terms to obtain broad protection for persons who are vulnerable due to youth or dependency or both.” Opinion at 6 (emphasis added). Yet the phrase “or both” does not appear in the statute. A reviewing court “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

Assuming, arguendo, “child” and “dependent person” are not mutually exclusive, the Court of Appeals erred in ruling sufficient evidence supported the trial court’s finding and conclusion that S.A. was a dependent person. First, four-year-old S.A. obviously was not of “extreme advanced age.” Second, the term “disabled” was not mentioned whatsoever by the witnesses, the State, or the trial court, and does not appear in the court’s findings of fact or in the conclusions of law. Rather, in its oral decision, the trial court characterized S.A. only as a “four-year old.” 12/19/07RP 418. Therefore, in violation of Ms. Mitchell’s constitutional right to due process, there was insufficient evidence to prove beyond a reasonable doubt S.A. was a dependent person, an essential element of the offense as charged. See U.S. Const. amend. XI; Wash. Const. article I, sec. 3; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995).

Although the record is silent on this point, the Court of Appeal presupposes the trial court concluded S.A. was disabled. Opinion at 7. Unlike the terms “dependent person” and “child,” the term “disabled” is not defined by the criminal mistreatment statute. The Court of Appeals noted, “there is no basis for assuming that

the legislature intended [the term “disability”] to have a narrow or technical meaning.” Opinion at 7. Even if the Legislature intended a broad or non-technical meaning, however, there must be some evidence in the record to support a finding that S.A. was “disabled” and that the finding of disability was the basis for the conclusion that he was a “dependent person.” There is no such evidence in this record. The Court of Appeals’s conclusion that there was “ample” evidence to establish S.A. was disabled is simply incorrect. Opinion at 7.

The decision of the Court of Appeals that the term “dependent person” includes a disabled child is unsupported the plain language of the criminal mistreatment statute and unsupported by sufficient evidence in the record below. As such, the decision is in conflict with decisions from the United States Supreme Court, this Court, and other decisions by the Court of Appeals, involves a significant question of law under the federal and state constitutions, and involves issues of substantial public interest that should be decided by this Court. Pursuant to RAP 13.4(b)(1), (2), (3), and (4), this Court should accept review.

2. THE COURT OF APPEALS ERRED IN
RULING THAT S.A. WAS "PARTICULARLY
VULNERABLE."

A sentencing court may impose an exceptional sentence above the standard range where "[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance." RCW 9.94A.535(3)(b). To justify an exceptional sentence based on particular vulnerability, the State must prove "(1) that the defendant knew or should have known (2) of the victim's particular vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime." State v. Suleiman, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006) (emphasis in original).

An exceptional sentence cannot stand where "the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard range for that offense." RCW 9.94A.585(4). Those reasons must be "substantial and compelling." RCW 9.94A.537(6). A challenge to the reasons supplied to the sentencing judge is reviewed under the "clearly erroneous" standard. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

The trial court found S.A. was particularly vulnerable because of his issues with food only, not because of his age or physical weakness.

“[T]he evidence reflects that [S.A.] came into their home with issues regarding food and regarding the hoarding of food. He already had particular vulnerabilities in regard to eating food, and they knew that.”

12/19/07RP 419-20. The Court of Appeals upheld the trial court and sua sponte characterized S.A.’s food issues as “an eating disorder.” Opinion at 8-9. This ruling is in error.

First, the Court’s ruling is based on facts not in evidence. There was no evidence whatsoever that Ms. Mitchell withheld food because of S.A.’s issues with food or that she punished S.A. for hoarding food. Rather, Mr. Abegg stated he simply did not feel “connected” to S.A. and he sometimes withheld dinner as a form of punishment, as he was punished when he was a child and as did Ms. Mitchell at his request. 12/18/07RP 264; Ex. 59 at 52, 55, 61-62, 63. Therefore, S.A.’s pre-existing food issues were not a factor, much less a “substantial factor,” in the offense.

Second, there was no evidence S.A. had an “eating disorder.” The American Psychiatric Association recognizes three categories of eating disorders, anorexia nervosa, bulimia nervosa,

and eating disorder not otherwise specified. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders, 539-550 (4th ed. 1994) (DSM-IV). The "not otherwise specified" category does not include food hoarding. Id. at 550. While food hoarding may be a symptom of anorexia nervosa, but it is not a disorder in and of itself.

Finally, the Court's ruling is in conflict with other decisions from the Court of Appeals considering the "particularly vulnerable" circumstance. For example, in State v. Barnett, the defendant was convicted of multiple offenses against his girlfriend committed over a two-week period of time and received an exceptional sentence based on "particular vulnerability" because his girlfriend was seventeen years old and the defendant waited until she was alone before he broke into her house. 104 Wn. App. 191, 202, 16 P.3d 74 (2001). Division Three of the Court of Appeals found that those facts did not constitute "particular vulnerability," and stated, "Mr. Barnett chose Ms. M because of their failed relationship, not because she presented an easy target for a random crime. The evidence does not support a finding of particular vulnerability." Id. at 205.

In State v. Serrano, the defendant was convicted of murder of a coworker who was allegedly having an affair with his wife and received an exceptional sentence based on “particular vulnerability,” where the coworker was shot while he was in the air in an “orchard ape,” a caged platform on a hydraulic lift, and could not run or otherwise protect himself. 95 Wn. App. 700, 702-03, 710-11, 977 P.2d 47 (1999). Division Three ruled those facts did not constitute “particular vulnerability, and stated, “[A]lthough it may be true that Mr. Gutierrez was vulnerable because he was above the ground in an “orchard ape,” the record does not suggest this vulnerability was a substantial factor in the shooting.” Id. at 712. See also State v. Hooper, 100 Wn. App. 179, 187, 997 P.2d 936 (2000) (“particularly vulnerable” finding not justified when victim assaulted while using the telephone because victim “equally vulnerable” regardless of using the telephone); State v. Jackmon, 55 Wn. App. 562, 564-65, 567, 778 P.2d 1079 (1989) (“particular vulnerability” finding not justified when victim was disabled due to a broken ankle but the disability did not render him any more vulnerable to the attempted murder than a nondisabled person).

Similarly here, there was no evidence Ms. Mitchell withheld food because of S.A.’s pre-existing food issues or that those issues

made him more vulnerable to malnourishment than a child without those issues or that his food issues were a substantial factor in the offense. Rather, he was “equally vulnerable” regardless of his issues.

The decision of the Court of Appeals affirming the exceptional sentence due to “particular vulnerability” is in conflict with decisions by this Court and other decisions by the Court of Appeals and involves an issue of substantial public interest that should be decided by this Court. Pursuant to RAP 13.4(b)(1), (2), and (4), this Court should accept review.

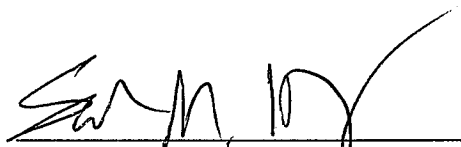
F. CONCLUSION

The decision of the Court of Appeals that the terms “dependent person” and “child” refer to two separate and distinct groups of persons is contrary to well-settled rules of statutory construction, in conflict with decisions by this Court and other decisions by the Court of Appeals, and involves an issue of substantial public interest. The decision of the Court of Appeals that sufficient evidence supported finding S.A. was a disabled dependent person is contrary to the right to due process, involves a significant question of law under the federal and state constitutions, is in conflict with decisions by this Court and other decisions by the

Court of Appeals, and involves an issue of substantial public interest. The decision that S.A. was particularly vulnerable to malnourishment and that vulnerability was a substantial factor in the offense is unsupported by the record, is in conflict with decisions by this Court and other decisions by the Court of Appeals, and involves an issue of substantial public interest. United States Supreme Court, involves a significant question of law under the federal and state constitutions, and involves issues of substantial public interest that should be decided by this Court. For the foregoing reasons, Ms. Mitchell respectfully requests this Court accept review of the Court of Appeals decision in this case.

DATED this 13th day of May 2009.

Respectfully submitted,



SARAH M. HROBSKY (12352)
Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

| | |
|----------------------|-------------------------|
| STATE OF WASHINGTON, |) NO. 61462-2-I |
| |) |
| Respondent, |) |
| |) |
| v. |) PUBLISHED OPINION |
| |) |
| MARILEA R. MITCHELL, |) |
| |) |
| Appellant. |) FILED: April 13, 2009 |

BECKER, J. — Appellant Marilea Mitchell and her boyfriend were convicted of the crime of criminal mistreatment for starving a young, undernourished boy who lived with them. The information alleged that Mitchell had “assumed the responsibility to provide to a dependent person the basic necessities of life.” The statute defining the crime speaks of causing bodily harm “to a child or dependent person.” Appellant contends the terms “child” and “dependent person” are distinct and mutually exclusive and that the conviction violated her due process rights

because there was no evidence the boy was "a dependent person" rather than a "child." We hold the terms are not mutually exclusive and affirm the conviction.

The child in question, S.A., was born in October 2002. His biological father is Danny Abegg. According to testimony at trial, from the age of five months until the age of three, S.A. lived with Pam Taylor. S.A.'s mother, a drug addict, took him away from Taylor in October 2005. The boy's mother did not feed him, and as a result he began to hoard food. Two months later Abegg assumed custody and began to care for S.A. Also living in the home was Abegg's girlfriend, appellant Mitchell, who shared with Abegg the responsibility of looking after S.A. At that time the boy weighed 38 pounds.

A year later, Mitchell's sister saw S.A. and became concerned that the boy was too skinny. She offered Mitchell and Abegg help in getting him to a doctor. Mitchell put her off, saying that they were working on getting medical coupons. When Mitchell's sister saw S.A. three months later in March 2007, she called Child Protective Services. Police went to the apartment where the family was living on a report that there was a boy who might be starving and in need of medical attention. They found S.A. in bed, smelling of urine. He was pale, emaciated and so weak that he could not stand up on his own. He weighed less than 26 pounds. Doctors who examined S.A. concluded that he was in a severely malnourished and life-threatening condition, and that he had been suffering from malnutrition for a long time.

While in the emergency room, S.A. said that if he ate he would be punished by being required to stay in his bed or sleep in the bathtub. Later, at Children's Hospital, he was reluctant to eat in the daytime. He explained that he was not allowed to eat unless it was dark out. Hospital staff caught him hoarding food.

The State charged Mitchell and Abegg with criminal mistreatment in the first degree. A bench trial was held in December 2007. Mitchell and Abegg were tried together. There was evidence that when they caught S.A. hoarding food, they sent him to his room and locked up the food. Mitchell and Abegg argued that they did not realize how bad the situation was with the boy. They asked the court to find that their mental state was at most one of negligence, rather than recklessness. The court found Mitchell and Abegg guilty of criminal mistreatment in the first degree as charged in the information. Mitchell appeals.

The amended information alleged that Mitchell was "a person who has assumed the responsibility to provide to a dependent person the basic necessities of life" and had caused bodily harm by withholding them. Mitchell challenges the

sufficiency of the evidence to prove this allegation.¹

Due process requires the State to produce sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. In Re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is sufficient to support a conviction only if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 210, 829 P.2d 1068 (1992). A criminal defendant may not be convicted for an uncharged offense. State v. Brown, 45 Wn. App. 571, 576, 726 P.2d 60 (1986).

The dispute in this case is about the proper interpretation of the statute. The meaning of a statute is a question of law that is reviewed de novo. The court's fundamental objective is to ascertain and carry out the legislature's intent. If the statute's meaning is plain on its face, then courts must give effect to its plain

¹ The written findings and conclusions entered by the trial court are sufficient to facilitate appellate review of the exceptional sentence, but the finding underlying the conviction states only "that the defendant is guilty beyond a reasonable doubt of the crime of criminal mistreatment in the first degree as charged in the information." Clerk's Papers at 23. This is insufficient to satisfy the requirement in CrR6.1(d). State v. Head, 136 Wn.2d 619, 622-23, 964 P.2d 1187 (1998). Under Head, the failure to enter findings of fact after a bench trial would normally require a remand for the entry of proper findings where the appellant raises the issue. We are not remanding here because Mitchell has not raised the issue and because the lack of detailed findings does not hamper appellate review of the sufficiency of the evidence to prove the crime as charged in the information.

meaning as an expression of what the legislature intended. State v. J.M., 144

Wn.2d 472, 480, 28 P.3d 720 (2001).

The Legislature adopted the criminal mistreatment statute in 1997 after making the following finding:

The legislature finds that there is a significant need to protect children and dependent persons, including frail elder and vulnerable adults, from abuse and neglect by their parents, by persons entrusted with their physical custody, or by persons employed to provide them with the basic necessities of life. The legislature further finds that such abuse and neglect often takes the forms of either withholding from them the basic necessities of life, including food, water, shelter, clothing, and health care, or abandoning them, or both. Therefore, it is the intent of the legislature that criminal penalties be imposed on those guilty of such abuse or neglect.

RCW 9A.42.005, in part. Criminal mistreatment in the first degree is defined as follows:

A parent of a child, the person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the first degree if he or she recklessly, as defined in RCW 9A.08.010, causes great bodily harm to a child or dependent person by withholding any of the basic necessities of life.

RCW 9A.42.020(1).

Mitchell contends the evidence was insufficient to prove that she withheld basic necessities from a "dependent person," or that the boy was a "dependent person." Mitchell contrasts the statutory definitions of "dependent person" and "child." A "dependent person" means:

a person who, because of physical or mental disability, or because of extreme advanced age, is dependent upon another person to provide the basic necessities of life. A resident of a nursing home, as defined in RCW 18.51.010, a resident of an adult family home, as defined in RCW 70.128.010, and a frail elder or vulnerable adult, as defined in RCW 74.34.020(13), is presumed to be a dependent person for purposes of this chapter.

RCW 9A.42.010(4). A "child" means "a person under eighteen years of age." RCW 9A.42.010(3).

According to Mitchell, the fact that the statute defines "dependent person" and "child" differently means that the two terms are mutually exclusive. She cites the rule of construction that says there is a difference in legislative intent where the legislature uses certain statutory language in one instance, and different language in another. State v. Roggenkamp, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) (the legislature is "deemed to intend a different meaning when it uses different terms"). Since the information used the term "dependent person" to describe a victim who plainly belongs to the category of "child," Mitchell contends she was convicted of an uncharged offense.

We find nothing in the statute to indicate an intention that a victim must fall into only one category. The statute simply uses the two terms to obtain broad protection for persons who are vulnerable due to youth or dependency or both. RCW 9A.42.020(1) consists of one sentence. The first part defines the four categories of relationships that create potential defendants. The second part makes it a crime to violate the specified relationship by withholding the basic necessities of

life. We conclude this meaning of the statute is plain on its face, and it does not foreclose the State from regarding as "dependent" someone who is also a "child."

The State charged Mitchell under the statute with being "a person who has assumed the responsibility to provide to a dependent person the basic necessities of life." This charge obligated the State to prove that S.A. was dependent upon Mitchell "because of physical or mental disability." Before this court at oral argument, Mitchell took the position that the State's proof was insufficient because no one used the word "disability" when testifying about what was wrong with the boy. But the statute does not provide a definition of "disability," and there is no basis for assuming that the legislature intended it to have a narrow or technical meaning. The statute presumes that certain categories of people, such as residents of nursing homes, are dependent. This does not prevent the State from proving that a person not within those categories is dependent.

Here, the evidence is ample to support a conclusion that four-year-old S.A. was a dependent person as well as a child. Severely malnourished to the point where his body was beginning to consume itself, he had a physical disability that a normal child of his age does not have. He was physically incapable of getting food for himself because he was too weak to walk. He depended on Mitchell to provide him with the basic necessities of life. Her conviction must be affirmed.

EXCEPTIONAL SENTENCE

A standard range sentence for the crime would have been between 31 and 41 months. The court imposed an exceptional sentence on Mitchell of 96 months. The exceptional sentence was based on two findings. The first was that the victim was particularly vulnerable. The second was that the crime was a domestic violence crime manifested by multiple incidents over a prolonged period of time. Mitchell challenges only the finding of particular vulnerability.

To justify a sentence based on particular vulnerability, the State must prove: (1) that the defendant knew or should have known (2) of the victim's particular vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime. State v. Suleiman, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006). Mitchell contends the finding of particular vulnerability is not supported by the record. Such a challenge is reviewed under the "clearly erroneous" standard. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

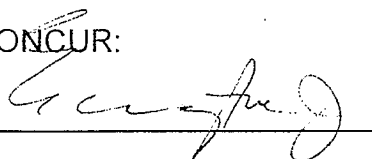
To be a substantial factor, the victim's disability must have rendered the victim "more vulnerable to the particular offense than a nondisabled victim would have been." State v. Jackmon, 55 Wn. App. 562, 567, 778 P.2d 1079 (1989) (broken ankle did not render victim more vulnerable; he was sitting down at the time defendant shot him). Mitchell contends S.A.'s food issues did not make him more vulnerable to mistreatment than any other child would have been. This argument is without merit. As the trial court observed, the boy was unlike a normal four year old

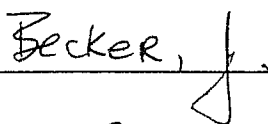
when Mitchell was caring for him. He was preoccupied with food and hoarded it because of his past experience when his mother deprived him of food for several months. The defendants were aware that S.A. had an eating disorder. A social worker had discussed it with them. Yet despite S.A.'s unique vulnerability to food deprivation, Mitchell and Abegg used food deprivation as punishment when S.A. was caught taking food without permission. The boy's statements at the hospital confirm that he was afraid that eating would get him in trouble. We conclude there was ample support for the conclusion that S.A. was particularly vulnerable to the food deprivation Mitchell inflicted upon him.

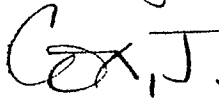
The trial court imposed a term of community custody. The State concedes that there is no authority for a term of community custody when a person is convicted of criminal mistreatment in the first degree under RCW 9A.42.020(1). The State also agrees that Mitchell is entitled to credit for time served prior to sentencing. A remand is necessary to allow the trial court to address these issues with a corrected sentence.

The conviction and exceptional sentence are affirmed. The sentence is remanded for correction as noted above.

WE CONCUR:







FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 MAY 13 PM 4:41

DECLARATION OF FILING & MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 61462-2-I** (for transmittal to the Supreme Court) and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for ☒ **respondent: Mary Kathleen Webber - Snohomish County Prosecuting Attorney-Appellate Unit**, ☐ **appellant** and/or ☐ **other party**, at the regular office or residence as listed on ACORDS or drop-off box at the prosecutor's office.


MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: May 13, 2009